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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 359.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

WILLIAM A. CLARK, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLEE.

WALTER M. BICKFORD,
GEORGE F. SHELTON,
Counsel for Appellee.

(19,861.)

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For the purpose of controverting certain statements unwarranted by the facts, contained in Appellant's Brief, we present the following Supplemental Brief:

CONCERNING THE RECORD.

Counsel for Appellant apologizing for the length of this record, offer in excuse the fact that objections were made by Defendant's Counsel, at the taking of testimony before the examiner. In answer we say that an inspection of the record will convince the Court that Counsel for Defendant would have been derelict in their duty had they permitted to pass unchallenged the questions to which objections were made and the testimony given in response thereto. The questions were clearly objectionable, both in form and substance, and the testimony was not of facts but of rumors, legal conclusions, hearsay statements, idle gossip, and clearly incompetent. The objections duly presented in this record

were before the Circuit Court at the hearing and Judge Knowles in his opinion in commenting thereon says:

> "It should be observed, however, that there is a great deal of irrelevant testimony presented, and there has been indulgence in asking leading questions of the witnesses for the complainant that is unprecedented. It is claimed that witnesses were hostile witnesses. There is no appearance, however, of unwillingness on the part of any of the witnesses to testify in the case; the witnesses were the witnesses of the complainant and it ought to have been made to appear clearly in the record that these witnesses were hostile, they were not parties to the suit."
>
> "As to the witness Griswold, who was certainly a most willing witness for the complainant, the same practice was observed."
>
> Rec., Vol. Pl. & Ind., pp. 65-66.

In view of the foregoing, complaint that the objections of the Defendant's Counsel were without merit seems unwarranted.

THE TABULATED STATEMENT.

The tabulated statement between pages 12 and 13 of the appellant's brief is incorrect and misleading in the following particulars:

It purports to give the "amount received by each entryman or entrywoman, as admitted or claimed by the Government" and which is specified at various sums ranging from $100 and expenses to $290 and expenses. The uncontradicted evidence in the case, however, established that each entryman and entrywoman received, *not as hire for services,* but as the purchase price of the land sold, sums ranging from $540 to $1,500, which was the highest price that they were able to obtain. These were actual sales, made after purchase from the government of lands owned by the entry-

men and entrywomen, and which they had full right to sell under the decisions of the Courts.

It purports to state "By whom purchase price of lands and expenses were paid," and names R. M. Cobban in every instance, save two, in which it appears "R. M. Cobban per J. & F," meaning Jackway and Faust. The uncontradicted evidence, however, established that neither personally nor through Jackway and Faust, nor any other person, did Cobban furnish the purchase price paid at the Land Office, nor did he pay the expenses of the entrymen or entrywomen; but that the money was provided by each entryman or entrywoman themselves. In some instances it was borrowed, but the money required to make the entries was in no sense furnished by any one save the entryman or entrywoman.

The evidence is uncontradicted that the money borrowed by them was a loan which they were in good faith bound to repay.

It purports to give the person "by whom" the entryman or entrywoman were located. The uncontradicted evidence however established that each person, who made entry personally went upon the land, located it in person and personally entered the same at the Land Office. In some instances they received information as to the most desirable lands from relatives or friends, but they were not located upon the lands by any person, and in examining, taking up and entering the same; all the requisite steps were their personal and individual acts.

It purports to give all "witnesses", but omits the names of more than two thirds of the witnesses who actually appeared before the Land Office and testified for the applicants, in making final proofs.

It purports to give "Date of Cobban's Deed to Clark."

In the case of Thomas Roll, the date is given as "Sept., 16, 1899", while "date of receiver's receipt", is given as "Oct., 27th, 1899."

The "date of Cobban's deed to Clark, for the land entered by Thomas Rall as given in the schedule is incorrect and the

true date of Cobban's deed to Clark was "Nov., 11, 189
and not "Sept., 16, 1899."

Comp. Ex. B.
Vol. Pl. & Ind., p. 221.
Vol. Pl. & Ind., pp. 40-41.
Defendant's Ex. 283.
Cobban's Testimony, Vol. 10, p. 5151.
Clark's Testimony, Vol. 10, p. 5101.
Wethey's Testimony, Vol. 9, p. 4401.

With this exception the tabulated statement is conclusi
that the receiver's receipt was of date, in some instance
three months prior to the date of the deed from Cobban
Clark, and in every instance the land had been entered
the Land Office and final receipt issued therefor, long pri
to the conveyance to Cobban or by Cobban to Clark, an
corroborates Cobban in his statement that he never attempte
to negotiate for the transfer of lands to which he did no
have full title.

The tabulated statement is misleading in that by omittin
important details, it is calculated to deceive and to lead t
conclusions not warranted by the evidence in the case, as t
which the exact contrary from that inferentially claimed i
true. Therefore we submit it should be disregarded.

The proofs do not show that Cobban and Griswold o
either of them, or any person employed by them, hired me
or women to enter any timber claims whatever.

On the other hand the uncontradicted testimony of every
witness, who testified in the case except Griswold establishes
the contrary.

The proofs do not show that the entrymen and entry-
women were taken upon the lands by Cobban and Griswold
or their employes, but on the contrary that each person went
upon the lands themselves and acted upon their own initia-
tive and for themselves alone.

Counsel for Appellant falls into the error of making gen-
eral statements which are directed to the whole case, instead

of discriminating. For instance, it is not "shown that they (the entrymen) were either taken or sent to Cobban's office in Missoula." The record shows that this is not the case. Some were so taken, but it is shown that these were either friends or acquaintances of Cobban or those, who wanted to borrow money with which to make their entry, and knew that Cobban was lending money for that purpose. Cobban did not "engineer and manage the business from beginning to end," nor name witnesses nor pay the money into the Land Office nor obtain possession of the final receipt.

It is true that the entrymen sold the land to Cobban, but the evidence is practically undisputed that this was not done by reason of a prior argument, nor did the uniform price of one hundred ($100) dollars govern the sale. Many of the entrymen tried to sell to other people and failing, sold to Cobban. It is true that the parties were under indictment, but they were not hostile witnesses, as will be clearly shown by their testimony. *Cobban has been tried for subornation of perjury and has been acquitted.*

It is true that the contract between Cobban and Griswold was made as stated in the Brief of Appellant, but it does not appear that any timber and stone entries were made thereunder, nor that any of the land mentioned in the bill of complaint was acquired under its terms. Cobban explains the contract at page 5188 of the Record, when he says, referring to the contract:

"The principal thing he was employed to do was to find out who had titled land to sell, or where he could take an option on the same at a reasonable price to do so and turn it over to me. He was also to look and report to me where there were good bodies of timber that could be scripped, or that were available Government lands."

But suppose the contract meant all claimed by the Appellant? How would it be binding upon the entrymen, or W. A. Clark, who are not shown to have had any knowledge of it? Can the Court forfeit the money of the entrymen, or

the title of the Appellee, because of an act of Cobban and Griswold, concerning which they had no knowledge?

Albert Jemison, whose testimony is referred to in Appellant's Brief, was not the agent of Cobban in locating persons upon timber lands. He states that he was expressly instructed by Cobban to make no agreements except for a loan.

Vol. I, pp. 391, 502, 510 (as corrected).

He expressly disproves the allegations of fraud contained in the bill and contradicts Griswold in every material respect.

Rec., Vol. I, p. 484 *et seq.*

As to his own entry he expressly contradicted Griswold's testimony.

Vol. I, pp. 221-222.

Jemison's Testimony Vol. I, p. 489.

The affidavit of Jemison given before Zevely referred to in Appellant's Brief, might be admissible for the purposes of impeachment but was not competent proof of any fact. This distinction has been overlooked by counsel and hence the conclusions based upon the assumption that this affidavit is evidence of any fact stated therein, do not follow.

In Appellant's Brief, the last paragraph of page 25 and the first paragraph on page 26, are in quotation marks. This is incorrect as no such testimony appears in the Record in the words as quoted. An examination of the testimony of the witness, particularly his cross-examinations referred to above, will make it clear that substantially his evidence is at variance with that given in quotation marks.

Vol. I, pp. 496, 498, 502, 503.

Jemison had been indicted but apparently was assured immunity in consideration that he should testify for the Government. His conflicting statements reveal a mind vacillating between a desire to escape prosecution and an inclination to tell the truth.

Vol. 2, pp. 598, 599.

The statements made in Appellant's Brief, on pages 26-27-28, that the persons named therein, admit that they received in round numbers $100, above expenses, is incorrect and not sustained by the testimony.

Cobban not only does not admit that the charges of the bill are true, but denies each and every one and the proof in the case is conclusive that his contention is right and that the facts are as claimed by the defense.

UPON QUESTIONS OF NOTICE TO APPELLEE.

The statements contained in Appellant's Brief, page 51, that the Big Blackfoot Milling Company had invaded territory claimed by Appellee, is incorrect and it appears from the testimony referred to that the conflict was between the Big Blackfoot Milling Company and Western Lumber Company a corporation of which Appellee was a stockholder and McLaughlin manager.

That no conference was held for the purpose of inaugurating retaliatory measures against the Big Blackfoot Milling Company, as intimated, but the meeting was for the purpose of consummating the deal for the purchase of timber lands which Cobban then owned.

Cobban did not hire people to make entries.

Sparks was not employed by Appellee, but was employed by the Western Lumber Company, and made the estimates which were used in buying the lands. Such estimates were only after Cobban had obtained title to the lands duly entered at the Land Office.

McLaughlin testifies: (Vol. 6, p. 2750-2751.)

That Cobban would come to him with a list of lands which he would say he owned. The list would be taken and sent to the man who did the estimating, to ascertain the amount of timber on the lands. On page 2751: It was after the time when the final receipt had been issued that the lands were examined for the purpose of ascertaining the quantity of timber thereon. Up to this time there was no contract between Clark and Cobban of any nature whatever. On page 2752: The contract was made after the time when

the Abstract of Title had been examined and the price was agreed upon.

Thus the statement on page 52 of Appellant's Brief, that estimates were made before final proof and thereby, Cobban was enabled to borrow money on the credit thereof, and pay for said lands, is refuted.

There is no proof to sustain the statement found on pages 54 and 55 of Appellant's Brief, that Cobban borrowed of Appellee money with which to pay for the lands, or that the lands were estimated prior to final proof, or that any of the money borrowed from Clark was used to secure lands. On the contrary, the evidence is conclusive that title to the lands was in Cobban long prior to the transfer to Clark and before negotiations to that end were initiated.

With relation to the loan of ten thousand ($10,000) dollars, made by the Bank of W. A. Clark & Brother, Oct. 31, 1899, to Cobban, the statement in Appellant's Brief page 62 *et seq.*, that, "Clark did loan ten thousand ($10,000) dollars to Cobban to buy lands, which at the time had simply been located upon, on the mere promise of Cobban to convey to him, when entries were completed and arranged when this was done, he would make Cobban an additional loan on his paying the first ten thousand ($10,000) dollars," is unsupported by any evidence and is disproved, by the note itself,

By the testimony of Cobban, (Vol. 10, page 5159).

By the testimony of Appellee (Vol. 10, pp. 5108, 5124, 5125).

By the testimony of Wethey (Vol. 9, p. 4560).

We therefore, submit that it is thus apparent that Appellant's conclusions and inferences are unwarranted by the testimony found in the Record.

Respectfully submitted,

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